# UNITED STATES DISTRICT COURT
# EASTERN DISTRICT OF NEW YORK

№ 15-CV-4083 (DLI)(RER)

SULEYMAN EREN AND TUNCAY SINAN,

Plaintiffs,

VERSUS

GULLOUGLU LLC AND ERCAN KARABEYOGLU,

Defendants.

REPORT & RECOMMENDATION

May 10, 2017

**To The Honorable Dora Lizette Irizarry,**
**Chief United States District Judge**

**RAMON E. REYES, JR., U.S.M.J.:**

Suleyman Eren ("Eren") and Tucany Sinan ("Sinan") (collectively "Plaintiffs") commenced this action against their former employers for (1) failure to provide overtime pay as required under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207, and New York Labor Law ("NYLL") § 651, (2) failure to pay spread-of-hours wages as required under 12 NYCRR § 142-2.4, and (3) violation of New York's Wage Theft Prevention Act, NYLL § 195(3). (Dkt. No. 1). Initially the complaint named multiple entity defendants, but following a stipulation filed by Plaintiffs, the scope of this action was limited to Gullouglu LLC and Ercan Karabeyoglu (collectively "Defendants"). (Dkt. No. 1, 13, 19). Defendants now move for summary judgment pursuant to Fed. R. Civ. P. 56, arguing that Plaintiffs fall within the creative professional exemption to the FLSA and NYLL. (Dkt. No. 33). Your Honor has referred this motion to me for a report and recommendation. (Order Dated 4/12/2017). For the reasons stated herein, I respectfully recommend that Defendants motion be denied.

## BACKGROUND

Gulluoglu, LLC ("Gulluoglu"), an entity managed and partially owned by Ercan Karabeyoglu ("Karabeyoglu"), sells Turkish food from multiple storefront locations, including several in New York City. (Dkt.

No. 34-6 (Deposition of Ercan Karabeyoglu ("Karabeyoglu Depo")) at 21:8-9, 26:22-27:12). Gulluoglu purchases its supplies from a Turkish entity of the same name, which became part owner of Gulluoglu in 2007. (Karabeyoglu Depo 23:7-12). Plaintiffs are former employees who were allegedly under-compensated in violation of the FLSA and NYLL. (Dkt. No. 13 (Amended Complaint)).

Eren began his career when his father sent him to apprentice for a baklava maker in Turkey. (Dkt. No. 33-1 (Defendants' Rule 56.1 Statement ("Df. R. 56.1")) ¶¶ 5-6; Dkt. No. 33-1 (Plaintiffs Rule 56.1 Counter Statement ("Pl. Counter St.")) ¶¶ 5-6). At the time he was 12 or 13 years old. (Df. R. 56.1 ¶¶ 5-6; Pl. Counter St. ¶¶ 5-6). After approximately 7 years as an apprentice, Eren began working as a baklava chef in his native Turkey. (Df. R. 56.1 ¶ 5; Pl. Counter St. ¶ 5). The parties dispute whether this qualified Eren as a "baklava expert." (Df. R. 56.1 ¶ 7; Pl. Counter St. ¶ 7).

In early 2005 Eren immigrated to the United States and took a job with Defendants, which he retained until 2014. (Df. R. 56.1 ¶ 1; Pl. Counter St. ¶ 1). The parties agree that Defendants hired Eren for the express purpose of making baklava, although they dispute whether his duties included managing and overseeing production or simply preparing baklava on his own. (Df. R. 56.1 ¶ 10; Pl. Counter St. ¶ 10). According to Eren he never prepared baklava from scratch. (Dkt. No. 33-2 (Plaintiffs' Statement Of Additional Facts ("Pl. R. 56.1")) ¶ 25). Instead, Eren would heat and apply a "sweet syrup[,]" to frozen baklava imported from Turkey. (Dkt. No. 34-4 (Deposition of Suleyman Eren ("Eren Depo")) 36:19-21). Beginning in 2010 the baklava was imported pre-cooked, with the syrup glaze already applied, and Eren merely defrosted it. (Eren Depo 38:14-39:3). That same year, Eren learned to make several other Turkish deserts and bread products, which he prepared from scratch. (Df. R. 56.1 ¶ 12-13; Pl. Counter St. ¶ 12-13). He was taught to make them from other local chefs he knew. (Eren Depo 39:20-22). He claims he was also required to perform various non-skilled work around the store. (Pl. R. 56.1 ¶ 27).

Sinan was born in Turkey, where he was trained to make various Turkish cakes and pastries. (Df. R. 56.1 ¶ 14; Pl. Counter St. ¶ 14). During his career, Sinan "ma[de] pastries for a variety of employers" and participated in a "1-year culinary training program at the Hyatt Regency in Nevada." (Df. R. 56.1 ¶ 15; Pl. Counter St. ¶ 15). Sinan worked for Defendants from 2010 to 2012. (Df. R. 56.1 ¶ 2; Pl. Counter St. ¶ 2). According to Defendants, "Sinan was employed…preparing cakes." (Df. R. 56.1 ¶ 19). Plaintiffs claim that "Defendants first hired Sinan to work behind the counter, work at the grill, pour coffee, and stock the refrigerator[,]" and it was only later that he began preparing cakes. (Pl. Counter. 56.1 ¶ 19). Sinan claims that, like Eren, he did not make his cakes from scratch, but instead received imported Turkish cakes for preparation. (Pl. R. 56.1 ¶¶ 26-27).

Preparation consisted of applying basic ornamentations to the cakes. (Dkt. No. 34-5 (Deposition of Tuncay Sinan ("Sinan Depo") 31:18-21) ("The cakes came from Turkey in a frozen state with only one layer of cream on top, and I would put another layer of cream. Then I would put the fruit and some chocolates as ornaments."). The cream and chocolate used for ornamentation were purchased pre-made. (Sinan Depo 32:12-18). Sinan did bake various Turkish breads from scratch, but claims to have only performed this task once or twice a week. (Df. R. 56.1 ¶¶ 20-21; Pl. Counter St. ¶¶ 20-21; Pl. R. 56.1 ¶ 29). This represented "a very, very small percentage" of his working hours. (Pl. R. 56.1 ¶ 30). The parties dispute whether Sinan was responsible for ordering supplies from Turkey. (Df. R. 56.1 ¶ 22; Pl. Counter St. ¶ 22).

## DISCUSSION

Parties moving for summary judgment must prove "there is no genuine dispute as to any material fact and [that they are] entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Goenaga v. March of Dimes Birth Defects Found*, 51 F.3d 14, 18 (2d Cir. 1995). Where the defendants' motion is predicated on an affirmative defense, such as an FLSA or NYLL exemption, the moving party must present undisputed evidence. *Id*; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If this evidence, viewed in the light most favorable to the nonmoving party, is such that a "jury could reasonably find for the [nonmovant,]" the motion must be denied. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

### I. Overtime & Spread-Of-Hours Claims

Plaintiffs have alleged violations of the FLSA and NYLL. (Amended Complaint ¶ 1). The FLSA and NYLL require employers to provide employees with overtime pay, equal to one and one-half times their base salary, for every hour worked in excess of forty hours in any given week. 29 U.S.C. § 207(a); NYLL § 651. Additionally, NYLL mandates that employees receive spread-of-hours pay for any day in which they work over ten hours. 12 NYCRR § 142-2.4. Application of these rules is limited by several statutory exemptions. 29 U.S.C. § 213(a); *see also Reiseck v. Universal Commc'ns of Miami, Inc.*, 591 F.3d 101, 104-05 (2d Cir. 2010) (incorporating the FLSA exemptions into NYLL). Defendants argue that Plaintiffs' work fell within one such exemption, the creative professional exemption, and as such Plaintiffs are not entitled to any additional compensation. (Dkt. No. 35 (Defendants' Memorandum in Support ("Df. Br.")) at 4).

Under the FLSA, "any employee employed in a bona fide executive, administrative, or professional capacity" is exempt from coverage. 29 U.S.C. § 213(a)(1). The defendant-employer bears the burden of proving its employee falls within an exemption. *Karropoulos v. Soup du Jour, Ltd.*, No. 128 F.Supp.3d 518, 527 (E.D.N.Y. 2015). Consistent with the law's remedial nature, "[e]xemptions for the FLSA's requirements 'are to be narrowly construed against the employers seeking to assert them and their application limited to those establishments plainly and unmistakably within their terms and spirit.'" *Davis v. J.P. Morgan Chase & Co.*, 587 F.3d 529, 531 (2d Cir. 2009) (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392, 80 S.Ct. 453, 3 L.Ed.2d 393 (1960).

Defendants base their motion on a subset of the professional exemption, known as the creative professional exemption. (Df. Br. at 1). This exemption applies when "an employee's primary duty [is] the performance of work requiring invention, imagination, originality or talent in a recognized field of artistic or creative endeavor as opposed to routine mental, manual, mechanical or physical work." 29 C.F.R. § 541.302(a). Whether an employee falls within an exemption presents a mixed question of law and fact. *Pippins v. KPMG, LLP*, 759 F.3d 235, 239 (2d Cir. 2014) ("The question of how the employees spend their working time is a question of fact. The question of whether their particular activities excluded them from the overtime benefits of the FLSA is a question of law."). "Determination of exempt creative professional status, therefore, must be made on a case-by-case basis." 29 C.F.R. § 541.302(c)

1. Plaintiffs' Duties Did Not Require Invention, Imagination, Originality or Talent

For a task to fall within the creative professional exemption, it must require "invention, imagination, originality or talent." 29 C.F.R. § 541.302(a). Under certain conditions, chefs may satisfy this description. *Karropouls*, 128 F.Supp.3d at 535. According to a DOL interpretation, chef work satisfying this definition "involve[s ] regularly creating or designing unique dishes and menu items." *Defining and Delimiting the Exemptions*, 69 Fed.Reg. 22122-01 (2004). Such creation alone is not enough, "and the creative professional exemption must be applied…only to truly 'original' chefs, such as those who work at five-star or gourmet establishments, whose primary duty requires 'invention, imagination, originality, or talent.'" *Id.*

Courts have been reluctant to apply this definition to all but the most extraordinary chefs. *Karropouls*, 128 F.Supp.3d at 535-36 (finding a chef who created some dishes but predominantly worked as a line chef was not an exempt employee); *see also Garcia v. Panco Villa's of Huntingto Vill., Inc.*, No. CV 09-486(ETB), 2011 WL 1431978, at * 3 (E.D.N.Y. Apr. 14, 2011) *adopted* 2016 WL 7480363 (finding that the plaintiff's position as a cook did not, in and of itself, make him a creative professional). *Guardado v. 13 Wall Street, Inc.*, No. 15-V-02482 (DRH)(SIL), 2016 WL 7480358, at *4 (E.D.N.Y. Dec. 2, 2016) (finding "a cook and food preparer with no ancillary managerial or supervisory responsibilities" was not an exempt employee).

Several points of contention exist regarding the exact nature of Plaintiffs' work. What is clear, however, is that if a reasonable jury were to accept Plaintiffs' account of their employment, they would fall well outside the creative professional exemption.

A jury could reasonably conclude that Eren's job consisted of preparing baklava and breads while Sinan's job was preparing cakes and breads. As Eren describes it, preparation of the baklava was completely routine. It consisted of defrosting pre-made food in exactly the same way over and over again. (Eren Depo 36:19-21, 38:14-39:3). This required consistency and precision, not innovation and imagination. Sinan's job arguably involved more creativity, in so far as he was required to decorate cakes. (Df. R. 56.1 ¶ 19; Pl. Counter St. 19; Sinan Tr. 30:1-25). However, Sinan did not prepare the cakes, which arrived pre-made, and his decoration consisted of applying icing and fruits. (Sinan Depo 31:12-21). The range of possible designs was thus highly limited and there is no suggestion that Sinan was creating visual masterpieces. These tasks are a far cry from the standard usually applied to chefs, which requires creation of menu items and new dishes not reproduction standard fair. *Karropouls*, 128 F.Supp.3d at 535-36. Nor is it clearly established that Plaintiffs possessed managerial or supervisory responsibility. *Guardado*, 2016 WL 7480358, at *4.

Both Eren and Sinan made some food products from scratch. (Df. R. 56.1 ¶ 12, 20-21; Pl. Counter St. ¶ 12, 20-21) While closer to the intent of the creative professional exemption, there is still no indication that they employed creativity or originality in the manner envisioned by the exemption. Consistent with the Second Circuit's instruction that exemptions be "limited to those establishments plainly and unmistakably within their terms and spirit[,]" *Davis*, 587 F.3d at 531, I cannot recommend applying the creative professional exemption in a way that would extend it to virtually every chef save those who work with pre-made food.

2. Defendants Have Failed To Establish Plaintiffs' Primary Duty

Even if one of Plaintiffs' activities fell within the exemption, Plaintiff argues that Defendants have failed to meet their burden of establishing that this was Plaintiffs' primary duty. (Dkt. No. 35-1 (Plaintiffs' Memorandum in Opposition) at 6). Employees are commonly called upon to perform a wide range of tasks, some of which fall within an exemption and some of which do not. Therefore, it is the employee's primary duty that is dispositive. 29 C.F.R. § 541.302(a) (The creative professional exemption applies to employees whose "*primary duty* [is] the performance of work requiring invention, imagination, originality or talent…") (emphasis added). An employee's primary duty is "the principal, main, major or most important duty that the employee performs." 29 C.F.R. 541.700(a). Distinguishing between primary and ancillary duties requires an examination of "the relative importance of the exempt duties as compared with other types of duties [and] the amount of time spent performing exempt work." 29 C.F.R. § 541.700(a).

Defendants have not presented evidence detailing how Plaintiffs spent their work days. It is therefore impossible to tell whether Plaintiffs primary duties were preparing pre-made foods, preparing breads from scratch, or performing other tasks. Therefore, even if this Court were to adopt such a wide interpretation of the exemption that Plaintiffs' preparation of bread fell within it, there is no way of determining if this constituted their primary duty.

## II. Wage Theft Prevention Act

Defendants also raise an affirmative defense under NYLL § 198(1-b), on the grounds that because they "made complete and timely payments of all wages due[,]" any violations of the Wage Theft Prevention Act is non-compensable. (Df. Br. at 11-12). For the reasons discussed above, I am unable to recommend finding that Defendants met their overtime or spread-of-hours requirements. Because Defendants have failed to satisfy their burden of proving "complete and timely payment of all wages due" this defense similarly fails.

## CONCLUSION

For the foregoing reasons, I respectfully recommend that Defendants' motion be denied. Any objections to this Report and Recommendation must be filed with the Clerk of the Court and the Honorable Dora Lizette Irizarry within fourteen (14) days of receipt of this Report. Failure to file objections within the specified time waives the right to appeal the District Court's order. See 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 6(b)(1); Fed. R. Civ. P. 72; *Small v. Sec'y of Health & Human Servs.*, 892 F.2d 15, 16 (2d Cir. 1989).

SO ORDERED

*Ramon E. Reyes, Jr.*
RAMON E. REYES, JR.
United States Magistrate Judge
Dated: May 10, 2017